United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

672

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 23049

HENSON CREEK DEVELOPMENT CORPORATION, INC., a corporation, Appellant

v.

WILLIAM E. RICHARDS, NICHOLAS N. KITTRIE, and BEAU BOGAN, INC., a corporation, Appellees

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Appeal From the Judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

ISSUES PRESENTED FOR REVIEW

1. Whether the purchaser under a real estate contract which never went to settlement should recover its deposit when the sellers, in their pleadings, deny that the contract had any legal effect.

2. Whether a real estate contract which provides for a purchase-money third trust and states that purchaser "will set aside sufficient assets to satisfy 3rd trust holders" is properly construed to permit the third trust holders to demand, as a condition of settling on the contract, that the purchaser put up additional security in the full amount of the third trust.

3. Whether the sellers under the real estate contract involved in this case sustained their burden of proving that the terms on which they offered to settle did not materially depart from the terms of the contract.

4. Whether in an action by the purchaser for damages for breach of a real estate contract it was error tc exclude evidence of the price at which the defendant sellers sold the property six months after the breach.

5. Whether sellers under a real estate contract on which settlement was not made are precluded from recovering the purchaser's deposit, held by a third party, where they subsequently sold the property at a price which exceeded the price under the contract.

This case has not previously been before this Court.

REFERENCES TO RULINGS

The Memorandum and Order dated February 25, 1969, in which the trial judge granted the motions of the sellers and their broker for directed verdict and denied the motion of the purchaser for directed verdict is reported at 296 F. Supp. 915 and is reproduced in the Appendix at pp. 66-73. The Order denying the purchaser's motion for summary judgment, which was entered on January 24, 1968, is contained in the Record as Item No. 30.

STATEMENT OF THE CASE

This is an interpleader case involving conflicting claims to a $10,000 deposit put up in connection with a contract for the sale of real estate in the District of Columbia. The parties in the trial court were the purchaser, a corporation (now dissolved), which was nominally plaintiff and which is appellant here, the sellers and their broker. The purchaser also sought damages for breach of contract.

The sellers, in their answer, referring to the contract in dispute, "deny that it has any legal effect in that it was not signed by the sellers and that it was improperly executed both by the sellers and plaintiff [the purchaser] . . . ." (App. 9)*/

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*/ Citations to "App." are citations to the Appendix filed with this brief.

Thereupon the purchaser moved for summary judgment on the claim for recovery of the $10,000 deposit plus interest from the date of demand. The purchaser accepted, for purposes of the motion, the sellers' averment that the contract had no "legal effect" and agreed, if it prevailed on the motion, to abandon its claim for damages for breach of contract. (Record, Item 21) The sellers, in opposing the motion, did not withdraw their averment that the contract had no legal effect and did not submit any affidavits. (Record, Items 24, 28) The District Court, without opinion, denied the purchaser's motion. (Record, Item 30)

The contract (Plaintiff's Exhibit 1, App. 24-25) is dated June 19, 1964. It shows that the purchaser agreed to buy the property in question for $230,000, payable as follows:

Cash	$ 60,000
Assume first trust	75,000
Assume second trust */	45,000
Give sellers third trust	50,000
	$230,000

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*/ This trust was to be in favor of a third party, from whom our sellers were purchasing the property for $168,000. (App. 17-18, 20)

Settlement was to occur on June 29, 1964. A $10,000 deposit put up at the time the contract was signed was to be credited against the cash required.*/ The deposit was held by the title company. (App. 19)

All three trusts carried a 6 percent interest rate but differed in the cash outlay required in the near future. The first trust called for semi-annual payments of $7,500, with the first payment not due until December 1964. The second trust called for payments of $315 per month. The third trust called for the principal to be repaid in two installments on July 1, 1965, and July 1, 1966, but called for monthly interest payments beginning 90 days after settlement.

The purchaser was going to develop the property by building low- and moderate-income housing with FHA financing (App. 31-32), a subject with which the purchaser's representative, Mrs. Lawson, had considerable familiarity (App. 26). For this reason, the purchaser was primarily interested in minimizing the cash to be put into the property between settlement and the securing of FHA financing.

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*/ The deposit was in the form of a personal check of Mrs. Lawson, the purchaser's representative, because the individuals authorized to sign checks of the purchaser were unavailable. Mrs. Lawson's check was cashed and she was reimbursed by the purchaser. (App. 21, 30, 47-48)

The contract also contained the following additional language relating to the third trust:

> "Purchasing corporation will set aside sufficient assets to satisfy 3rd trust holders."

This language was added by the sellers, who were to be the third trust holders. (App. 18) At the time the contract was signed, there was no specific discussion of what this provision meant. (App. 58, 59)

Unbeknownst to the parties, a $7,500 principal payment had been made on the first trust on or about June 8 -- before the contract was entered into. This was discovered by the settlement clerk on June 29, the day scheduled for settlement. (App. 19-20)

After conferring with the second trust holder and the sellers, the settlement clerk prepared papers reflecting sellers' two alternative proposals for dealing with the $7,500 by which the first trust had been reduced, and these two proposals were presented to Mrs. Lawson, the purchaser's representative, at the June 29 settlement. (App. 19-20)

One was to increase the second trust by that amount. The second trust holder agreed to this but only on condition that the additional $7,500 be repaid within

45 days and that the officers of the purchasing corporation personally endorse the note. This was unacceptable to the purchaser. (App. 20)

The second proposal was to increase the third trust, which was to be held by the sellers, by the $7,500. (App. 20) At the June 29 settlement, the sellers insisted that the purchaser, to meet the requirement for additional security (quoted above), freeze its bank account not only in the original amount of the third trust, $50,000, but also in the additional $7,500 by which the third trust would have been increased under this second proposal. This was also unacceptable to the purchaser. (App. 35-36, 41-42, 46-47, 55-56, 57, 58-59)

Settlement never occurred on the contract.*/ On July 2, 1964, the sellers purported to declare the $10,000 deposit forfeited. On July 8, 1964, the purchaser demanded return of the deposit. The title company refused to

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*/ The purchaser's representative, Mrs. Lawson, did not bring the required cash to the settlement. She testified, without contradiction, that she had advised the sellers' broker that the purchaser had sold a large tract of land to Mandel Ourisman Chevrolet and that a substantial cash payment (over $80,000) on that sale was to be made within a short time after June 29. She also testified, likewise without contradiction, that the sellers agreed that the cash payment due on the contract in dispute could be deferred until the Mandel Ourisman payment was received. (App. 32, 33-34, 45, 47-48)

adjudicate the conflicting claims. The sellers then sold the property to the District of Columbia. (App. 20-21, 22)

The purchaser brought this action to recover the deposit and damages. (App. 4-6) The title company counter-claimed for interpleader and, with leave of Court, paid the deposit into the Registry of the Court, after deducting attorney's fees, and withdrew from the case.*/ (Record, Item 30) The sellers and the broker agreed at pretrial that if they prevailed in the action the broker was entitled to one-half of the $10,000 deposit. (App. 16)

The case was tried before Judge Keech and a jury, with the purchaser, as nominal plaintiff, putting on its case first. During the course of trial and before the purchaser had rested, the judge sustained the objection of the sellers and their broker to the purchaser's attempt to read certain interrogatories and answers into the record. (App. 21-22) These related to the sale of the property by the sellers to the District of Columbia some 6 months

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*/ Ultimate responsibility for the sum deducted by the title company was left for decision by the trial court and the parties have stipulated that the losing side should pay the deducted sum.

after the parties in this case failed to settle on their contract. They would have shown that the price of the sale was $240,000, or $10,000 more than the price under the contract in dispute, and that the broker claimed a commission on that sale. (App. 12-15) This was the only evidence that would support any claim by the purchaser for damages, and the court granted a motion for a directed verdict on the damage claim at the close of the purchaser's case. (App. 22)

At the close of all the evidence, both sides moved for directed verdict. On the assumption that no material facts were in dispute, counsel stipulated that the jury be discharged. Two questions were presented for decision by the trial court: (1) whether the contract language, quoted above, referring to the purchaser setting aside assets "to satisfy" the third trust holders (the sellers) meant that the sellers could insist, as a condition of settlement under the original contract, that the purchaser freeze cash in the full amount of the third trust; (2) whether the reduction of the first trust by $7,500 and the proposed increase of the third trust by that amount, with the resulting change in the purchaser's

burdens thereunder, represented a material variance from the terms of the contract.*/ (App. 22, 60-65)

By Memorandum and Order dated February 25, 1969, the trial court granted the motion of the sellers and their broker and denied the motion of the purchaser. (App. 66-73) As to the first of the two questions listed above, the court observed that "the record is not clear" that the sellers had insisted that the purchaser freeze cash in the full amount of the original third trust but ruled that in any event this would be permissible under the contract.**/ As for the second question, the court ruled that the sellers had no right to insist on the purchaser freezing more than the original principal of the third trust, but the court found that there was "no definite evidence" that they had so insisted;***/ accordingly, the

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*/ It was conceded that the proposal to account for the $7,500 by increasing the second trust was, in view of the added burdens this would have imposed upon the purchaser, a material variance.

**/ Counsel for the purchaser, in agreeing to discharge the jury and submit the case to the court, acted in the belief that the record had established the sellers' insistence on the purchaser freezing cash in the full amount of the original third trust.

***/ Counsel for the purchaser, in agreeing to discharge the jury and submit the case to the court for decision, acted in the belief that there was "definite evidence" that the sellers had so insisted.

court held, the purchaser's refusal to settle under the proposal made by the sellers was not justified.

Notice of appeal was timely filed by the purchaser. (Record, Item 45)

SUMMARY OF ARGUMENT

1. The sellers averred, in their answer, that the contract involved in this case had no "legal effect." That means that the purchaser should have recovered the deposit it had put up, for otherwise the sellers and their broker would be unjustly enriched. Also, interest on the deposit should be assessed against the sellers from the date purchaser demanded return of the deposit because the sellers acted unreasonably in not authorizing return of the deposit at that time.

2. Each party -- the purchaser on the one hand and the sellers and their broker on the other -- stands in the relation of plaintiff vis-a-vis the deposit. The purchaser proved it was ready, willing and able to settle on the contract as made. The sellers did not: (a) They insisted, as a condition of completing settlement, that the purchaser provide security for the third trust, in addition to the trust itself, in the full amount of the trust; this they had no right to do under the contract.

(b) The first trust had been overstated in the contract by $7,500, and the sellers' two proposals to account for the $7,500 materially departed from the terms of the contract because they would have imposed burdens on the purchaser which were materially more onerous than those the purchaser had agreed to assume.

3. The trial court should have admitted the evidence showing that six months after the failure of settlement on the contract in dispute the sellers sold the property for $10,000 more than the contract price. This evidence was relevant to show purchaser's damages for the sellers' breach of contract. It was also relevant to show that the sellers had no legitimate claim to the deposit even if the failure to settle was chargeable to the purchaser.

ARGUMENT

I. In View of The Sellers' Averment That the Contract Had No "Legal Effect," Summary Judgment Should Have Been Granted to the Purchaser.

One of the most elementary principles of contract law is that before a contract is created there must be a manifestation of mutual assent by the parties. E.g., Restatement, Contracts § 19(b) (1932). Without this, there would be no contract.

The sellers under the contract in dispute in this case denied, in their answer to the complaint, that the contract had "any legal effect," citing as the reason "that it was not signed by the sellers and that it was improperly executed both by the sellers and plaintiff [the purchaser] . . . ." (App. 9) When the purchaser moved for summary judgment, seeking recovery of the deposit, the sellers did not withdraw their averment that they had not signed the contract and had improperly executed it, nor did they repudiate their claim that the contract had no legal effect.*/ The result is the same as if there had been a mutual rescission or abandonment, and it would plainly constitute unjust enrichment for the sellers (and their broker) to be allowed to keep the $10,000 deposit which the purchaser put up.**/

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*/ Indeed, the sellers, consistently with this claim, challenged the authority of Mrs. Lawson to act for the purchaser in the first place.

The sellers also challenged the unequivocal assertion in Mrs. Lawson's affidavit that she had been reimbursed by the purchaser after her personal check for the $10,000 deposit had been cashed by the title company. No affidavits or other evidence to controvert Mrs. Lawson's affidavit was ever supplied, the sellers relying only upon "mere allegations or denials" and thus not satisfying the requirement of Fed. R. Civ. P. 56(e) or Local Rule 9(h), nor was any such evidence produced during trial.

**/ There can be no contention that the broker is not bound by the sellers' averment that the contract had no legal effect. The broker's rights are wholly subordinate to his principals. There was no separate contractual relationship between the broker and the purchasers. Brill v. (contd.)

Accordingly, it was error for the trial court to have denied the purchaser's motion for summary judgment for recovery of the deposit.*/

By the same token, the purchaser should have been awarded interest from the date it demanded return of the deposit. D.C. Code § 15-108 provides that

> "In an action in the United States District Court for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid."

The deposit is "a liquidated debt." Moreover, interest is payable by "law or usage" where the delay in payment of the debt is due entirely to the unreasonable and vexatious conduct of the debtor. 47 C.J.S., Interest § 24.

That is the case here. Demand for return of the deposit was made by the purchaser on July 8, 1964.**/

(contd.) Mushinsky, 90 U.S. App. D.C. 132, 194 F.2d 158 (1952). If the sellers had ordered the deposit returned, that would have been binding on the broker. Logan v. Oliver, 96 A.2d 516 (D.C. Mun. App. 1953).

*/ The purchaser agreed to abandon its claim for damages for breach of contract if it prevailed on the motion.

**/ Although the deposit was then being held by the title company, the reason it was not returned to the purchaser was that the sellers demanded that it be paid to them, and the title company refused to adjudicate the conflicting claims.

Nearly three years later, when the sellers were finally called to account in court,*/ they admitted that they had not signed or properly executed the contract (in June 1964) and that it had no legal effect. If, as the purchaser claims, this amounted to a concession that the deposit should have been returned to the purchaser, the delay has surely been "unreasonable and vexatious." Therefore, interest at the statutory rate should be assessed against the sellers from July 8, 1964, the date purchaser demanded return of its $10,000 deposit.

II. The Sellers Did Not Sustain Their Burden of Proving They Were Ready, Willing and Able to Settle on the Contract.

Insofar as this case concerns recovery of the $10,000 deposit, it is a case of interpleader. The purchaser, on the one hand, and the sellers and their broker, on the other hand, are each claiming to be entitled to the deposit. Thus, on this aspect of the case each claimant occupies the position of plaintiff vis-a-vis the deposit, and each must establish his claim irrespective of the nominal designation of any party as plaintiff

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*/ The sellers' answer was filed June 14, 1967.

or defendant. Reconstruction Finance Corp. v. Aquadro, 7 F.R.D. 406, 409 (W.D. Pa. 1947); 3A Moore, Federal Practice ¶ 22.14[2] (2d ed. 1968).

It is a longstanding rule that "Failure on the part of the plaintiff to prove compliance, or tender of compliance, with his part of the contract, [is] fatal to his right to recover the deposit." Wynkoop v. Shoemaker, 37 App. D.C. 258, 266 (1911). This means that the purchaser and the sellers each had to prove that it or they were ready, willing and able to settle on the contract. The purchaser did so prove.*/ The sellers did not.

A. The Sellers Demanded, As a Condition of Settling on the Contract, More Security For the Third Trust Than They Were Entitled To.

The contract provided that the sellers were to take back a third trust (i.e., a note secured by a deed of trust on the property) of $50,000. But the sellers also inserted a provision calling for some additional security:

> "Purchasing corporation will set aside sufficient assets to satisfy 3rd trust holders."

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*/ The purchaser's representative testified, without contradiction, that the cash needed to settle was expected to be received by the purchaser approximately ten days after the settlement date and that the sellers understood this and agreed to defer the cash payment accordingly.

The trial court held that this entitled the sellers, as a condition of their settling on the original contract, to demand that the purchaser to freeze $50,000 in cash as additional security for the third trust, and that accordingly the sellers were not in default for so demanding.

This was error. Under a proper interpretation, the contract permitted the sellers to demand additional security in a reasonable amount, not the full amount of the trust.

The rule respecting interpretation of contractual provisions dealing with satisfying a party to the contract is:

> "In order that [a party's] personal satisfaction shall be held to be a condition of his duty, irrespective of reasonableness, the intention to make it so must be clearly expressed." 3A Corbin, Contracts § 644, at 80 (1960)

Where there is any doubt on the point, the contract will be interpreted to require satisfaction to a reasonable man, not to the promisee (the sellers here) personally, Restatement, Contracts § 265, particularly where the relevant language was added to the contract by the promisee rather than the other party, id. § 236(d). This should especially be true in a commercial situation, where the

purely personal satisfaction of a party would not generally be thought important.

The very nature of the transaction in this case bears out the view that the sellers were not entitled to demand extra security in the full amount:

(1) A requirement that the purchaser set aside, or "freeze", cash in the full amount of the third trust would have deprived the purchaser of having a trust in the first place. In effect, the transaction would be:

> A borrows $50,000 from B.
> B requires, as security, that A place the $50,000 in a bank and not utilize it until the loan is paid.

It would be strange indeed if the parties truly intended this result. Yet that is what the trial court's interpretation amounts to.*/

(2) The purchaser planned to develop the property through FHA financing of low- and middle-income housing. This meant there would in due course have been a "take-out" by FHA which would have paid off the existing

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*/ The trial court seems to have viewed this argument as an attempt by the purchaser to avoid an unwise bargain it had made. That is not so. The point is that the interpretation adopted by the court is not in accord with the parties' intentions because they can be presumed not to have made a foolish contract.

trusts. Thus, sellers, as third trust holders, would probably have been paid off well in advance of the maturity date of their trust.

(3) The contract contemplated that $50,000 of the purchase price ($230,000) be payable in the form of a third trust. The first two trusts (to be assumed) totalled, under the original contract, $120,000. The sellers were buying the property from a third party for $168,000, which means they needed approximately $48,000 cash to settle with him. The contract involved in this case called for $60,000 cash to settle. Thus, the sellers would have cleared a profit, having put no money of their own into the undertaking, even in the unlikely event that (a) there had been a complete default on the third trust and (b) at a foreclosure sale the property, which sellers were selling for $230,000, brought only $120,000 (to pay off the first two trusts).*/

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*/ The trial court's characterization of the transaction between the parties as a "speculative real estate deal" and "a mighty hazardous undertaking" (from the sellers' point of view) is not consistent with the facts, especially when it is recalled that the sellers managed to sell the property to the District of Columbia for $240,000 -- $10,000 more than the price under the contract in dispute and $78,000 more than they paid for it -- just 6 months later. Plaintiff was not told about the District's interest in the property. (App. 44)

Little need be said about the trial court's reference to "the tight money market." There was no evidence (contd.)

The cases the trial court cites do not support its interpretation of the contract. In Rondinella v. Southern Ry., 33 App. D.C. 65 (1909), plaintiff sent defendant a machine on 30-days' trial, pursuant to its catalogue, and defendant accepted it on that basis. Defendant made heroic efforts to get the machine working but finally gave up and returned it. The court said this was proper and, upon plaintiff's suit for the price, upheld a judgment for the defendant. The case is indeed followed, as the trial court points out, in Bayer Steam Soot Blower Co. v. W.G. Cornell Co., 47 App. D.C. 146 (1917), but the facts were substantially similar. The famous Dr. Pepper case*/ involved a contract that was laced with provisions expressly making the franchisor's judgment final as to whether or not the licensee's performance was satisfactory. Lanier v. New York Life Ins. Co., 88 F.2d 196 (5th Cir.), cert. denied, 301 U.S. 693

(contd.) on the point, and in any event no such condition existed in 1964 -- the time of the events involved in this case. Nor need much be said about the court's gratuitous characterization of plaintiff as "a corporation subject to dissolution." Presumably every corporation is subject to dissolution. The important point here is that this corporation had a valuable asset to back up its word.

*/ ARD Dr. Pepper Bottling Co. v. Dr. Pepper Co., 202 F.2d 372 (5th Cir. 1953).

(1937), did contain the dicta the trial court cites, relating to "one who contracts to be satisfied," but the court did not reach the question whether the dissatisfaction involved in the case was or was not reasonable because it reversed the lower court on other grounds.*/

Here, the only testimony on the point was that the sellers demanded that the purchaser freeze $50,000 in cash as additional security for a $50,000 loan that was already secured by a third trust on the property being sold.**/ The purchaser's representative resisted this demand and, as she testified, was prepared to be reasonable in negotiating the amount and nature of additional security that would be put up. The sellers' insisted, however, and the settlement thus could not have occurred even if there had been no reduction of the first trust. In other words, the collapse of the settlement is chargeable to the sellers, not the purchaser.

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*/ In any case, the opinion seems more to bear out the view that satisfaction must be that of a reasonable man. See 3A Corbin, supra, § 646 n.89.

**/ The trial court's finding that "the record is not clear" on this point is unacceptable in view of the testimony of plaintiff's representative -- the only evidence on the issue --, particularly since it was the sellers' burden to establish their readiness and willingness to settle in accordance with the contract.

B. Both of the Sellers' Proposals to Account for the $7,500 Represented Material Departures from the Contract.

At settlement, sellers made two proposals to account for the $7,500 by which the first trust had been overstated in the contract. Both proposals departed materially from the terms of the contract and the purchaser was not obligated to accept either.

Weiner v. Simons, 166 N.E. 765 (Mass. 1929), was a suit by a seller against the buyers for specific performance of a real estate contract. The contract had stated that the second mortgage, which the defendants were to assume, was due in September 1928, when it was in fact due August 1, 1928. In refusing specific performance and ordering the defendants' deposit returned, the court said:

> "The defendants were entitled to have what they contracted for. They cannot be required to accept something different. They could stand on the contract as made. . . . The defendants would be obliged to pay the entire principal and interest of this mortgage at least one month earlier than the contract called for. . . . [A]s the defendants could rely on the recitals in the contract they were not obliged to carry out a transaction differing from the one agreed to. The plaintiff could not fulfill the contract he made." (166 N.E. at 766.)

Rabinowitz v. Marcus, 123 Atl. 21 (Conn. 1923), also involved a misdescription of existing mortgages in a real estate contract. The contract price was $76,500. First mortgages of $30,000 and second mortgages of $23,175 were described in the contract, with the balance payable by cash and purchase-money mortgages. In fact, the terms of the mortgages differed from what the contract stated, the chief difference being that the principal of the second mortgages was $500 more than described in the contract. The court held the buyer was "clearly entitled to refuse to perform this contract of purchase." (123 Atl. at 23.) See also Rowe v. Shilby, 86 U.S. App. D.C. 74, 179 F.2d 807 (1950); Pringle v. Armstrong, 125 A.2d 325 (D.C. Mun. App. 1956); Antonelli v. Senate Realty Corp., 230 F. Supp. 776 (D.D.C. 1963).

Here, too, the sellers could not settle on the contract as made because the principal on the first trust was in fact $7500 less than the contract stated. The sellers first offered to have the $7500 put in the second trust, but the holder of that trust (who was the party from whom the sellers were acquiring the property) required repayment within 45 days and also the personal guarantee of purchasing corporation's officers. It seems not to be in dispute that the purchaser was not obliged to accept this proposal.

The second proposal was to add the $7,500 to the $50,000 third trust. This was also unacceptable to the purchaser. Asked why, the purchaser's representative testified as follows:

> "A In this one, the first trust would have been $67,500. The second trust would have beeen [sic] $4500 and the third trust would have been $57,500. And the difficulty with that one was that under the terms of the original contract the purchaser was to satisfy the sellers with security in addition to the note to the trust on the land with the additional security set aside, some property set aside to secure this third deed of trust and in the course of our conversations they made it pretty clear they meant by setting aside property, they wanted us to set aside money and they talked about freezing our bank account when our money came in so they would have in fact money in the bank to secure a deed of trust over and above the value of the land.
>
> "Q This would have been in the amount of $57,500 rather than $50,000?
>
> "A Yes. In addition, interest payments were to be made on the third trust and that would have made those payments larger." (App. 35-36)

Similarly, on cross-examination by the sellers' counsel, the purchaser's representative was asked whether adding the $7,500 to the third trust merely made the interest payments somewhat larger. She answered:

> "A It was a larger payment, but more important was the question of securing the third trust. We now had to secure an additional $7,500." (App. 46)

The same sequence was repeated on cross-examination by the broker's counsel, who asked whether the increased interest payments arising from this proposal were large enough to warrant rejecting the proposal:

> "A You may remember that I have testified that was not the major consideration. The major thing was how we would agree on setting aside sufficient assets to satisfy third trust holders, and the third trust holders, the sellers, were making it pretty clear they wanted money set aside, or failing that, would we make them some loans." (App. 56)

A moment later, after she had described a note held by the purchaser, the following colloquy took place:

> "Q Did they ask you to assign the proceeds of that note to them as security for that trust?
>
> "A Yes.
>
> "Q Were you willing to do so?
>
> "A No, it would not.
>
> "Q You would have assigned $50,000, but you would not have assigned $57,000?
>
> "A I would not have assigned $50,000." (App. 56-57)

It is thus clear that the sellers wanted the purchaser to freeze cash not only in the original amount of $50,000 but also in the new amount of $57,500 as additional security for the third trust. The trial court correctly held that this additional demand was a material

departure from the terms of the contract. The court's finding that there was "no definite evidence" on whether the sellers made the demand is clearly erroneous and should be set aside.

III. The Evidence of the Price the Sellers Later Received for the Property Should Have Been Admitted.

The sellers did not lose in the end. Although settlement on the contract involved in this case did not take place, the sellers sold the property six months later. In pretrial discovery, they admitted that the price they received was $240,000 -- $10,000 more than the price under the contract involved in this case.*/ But the trial court would not admit this evidence. This was error.

First, the evidence was relevant on the question of damages. This action involves not only the $10,000 deposit but also the purchaser's claim for damages for breach of contract. If the Court concludes, as is

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*/ They also admitted that the same broker who is a party to this case claimed a commission and that one of the two sellers paid the broker $6,000 and the other is resisting the broker's claim in the Court of General Sessions, Civil Action No. GS 9256-66 (App. 14)

urged above, either that (a) the sellers had no right to insist on the purchaser freezing $50,000 cash under the original contract or (b) the sellers' proposals to account for the $7500 materially departed from the terms of the contract, then the sellers broke the contract. That at least would entitle the purchaser to the return of its deposit. And since purchaser was not in default,*/ it is also entitled to damages.

The measure of damages for breach of contract is the difference between the fair market value of the property and the contract price. Quick v. Pointer, 88 U.S. App. D.C. 47, 186 F.2d 355 (1950). The District of Columbia was interested in acquiring the property (although plaintiff's representative was never told about this) and subsequently did acquire it for more than the price under the contract in dispute. That profit would have been received by plaintiff if the sellers had not broken the contract. It was error for the trial judge to exclude evidence of the amount.

Second, the evidence was relevant to show that the sellers should not have been permitted to recover the

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*/ On the uncontradicted evidence, the sellers agreed to wait to receive the cash due at settlement.

deposit even if the sole breach here was the purchaser's. This case is very much like Campanella v. Diener, 122 A.2d 772 (D.C. Mun. App. 1956). There the purchaser, Diener, refused to settle on a real estate contract. The broker, Campanella, bought the property for the contract price (collecting his commission on that transaction). The broker also held the deposit which the purchaser had put up. The purchaser sued him for it. The court held for the purchaser on the ground that the sellers "found another purchaser (Campanella) and sold to him at no loss. They waived their right to a forfeiture and as Diener's default caused them no actual damages, they had no rights under the contract when they assigned it to Campanella." (122 A.2d at 773.)

Another similar case is Rowe v. Shehyn, 192 F. Supp. 428 (D.D.C. 1961). Plaintiffs were sellers under a real estate contract, defendant was the buyer. The contract recited that the sellers had received a $5,000 deposit, but in fact the money had not changed hands. Settlement never occurred, and the sellers later sold the property for more than the contract price. The court held that the sellers were not entitled to recover the deposit:

> "* * * In the instant case the deposit called for was never paid into the

> hands of the Plaintiffs. Thus they can not be said to have been in a position to forfeit the deposit. In Sheffield*/ the Court of Appeals defines the term '"forfeit" the deposit' to mean 'keep it as liquidated damages and call the contract off.' 98 F.2d at page 252. Since as previously stated the $5,000 mentioned in the contract in this case as a deposit never came into the possession of the Plaintiffs, obviously Plaintiffs could not 'keep' said sum as a 'forfeit' within the meaning of the term 'forfeit' in Sheffield." (192 F. Supp. at 432.)

So here, the sellers cannot "keep" what they never had -- the $10,000 deposit -- and hence their subsequent sale of the property bars their recovery of the deposit, no matter who is at fault for the failure to settle under the contract in dispute.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the trial court and remand with directions to enter a judgment in favor of plaintiff for recovery of the $10,000 deposit, with interest at the statutory rate from July 8, 1964, and additionally

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*/ This is a reference to Sheffield v. Paul T. Stone, Inc., 68 App. D.C. 378, 98 F.2d 250 (1938).

for damages against the sellers for $10,000, with costs.

Respectfully submitted,

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June 20, 1969

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23049

HENSON CREEK DEVELOPMENT CORPORATION, INC., a corporation, Appellant

v.

WILLIAM E. RICHARDS, NICHOLAS N. KITTRIE, and BEAU BOGAN, INC., a corporation, Appellees

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

BEAU BOGAN, INC.

MATTHEW A. KANE
Attorney for Appellee
Beau Bogan, Inc.

INDEX

TABLE OF CASES CITED

Table of Cases Cited - Continued

OTHER AUTHORITIES

*Cases or Authorities chiefly relied upon are marked by asterisks.

Issues Presented for Review

Beau Bogan, Inc. agrees with the Statement of Issues in the Appellant's brief.

Statement of the Case

Beau Bogan, Inc. is dissatisfied with the Statement of the Case in the Appellant's brief, and adopts the Agreed Statement on Appeal (App. 17) as the complete and accurate Statement of the Case, as though set forth in full herein.

Summary of Argument

1. The answer of defendants Richards and Kittrie was addressed to the status of appellant (plaintiff below) as real party in interest, and the District Court properly denied plaintiff's motion for summary judgment when there appeared to be a substantial question of fact as to plaintiff's standing to sue.

2. A purchaser of real estate who agrees to furnish additional security "to satisfy 3rd trust holders" submits his performance to the sale and exclusive judgment of the persons to be satisfied, whose judgment will be enforced absent evidence of bad faith.

3. The sellers were ready, willing and able to make settlement upon the contract in substantial compliance with the contract and any deviations were not material.

4. The admissability of evidence of subsequent sales of the same property as evidence of fair market value for purposes of determining the

value of the loss of the bargain, is a matter for the sound discretion of the trial judge, which was properly exercised in this case to exclude evidence of a condemnation sale six months later.

5. The right of the sellers to declare a forfeiture of the deposit upon purchaser's default, is determined by the terms of the contract between the parties and is not affected by a resale of the property after declaration of the forfeiture but before return of the money.

Argument

1. In View of the Substantial Issue of Fact Regarding Plaintiff's Capacity to Sue, Summary Judgment Based on Defendant's Denial of a Contract With Plaintiff Was Properly Denied.

Henson Creek Development Corporation, Inc. (hereinafter called Henson Creek) sued the defendants "for restitution of plaintiff's deposit in the sum of ten thousand dollars ($10,000.00)", or alternatively for damages for breach of contract (JA 6). Defendants Richards and Kittrie answered, saying in effect that they had no contract with Henson Creek and that Henson Creek had not put up the deposit money.

This answer was well founded in fact. The undisputed evidence adduced at trial was that Marjorie Lawson, a stockholder but not an officer of the Corporation, signed the name of the Secretary-Treasurer of the Corporation to the contract without the knowledge or consent of the Secretary-Treasurer, and without authorization by corporate resolution. Mrs. Lawson put up her personal check for $10,000.00 for the deposit, stipulating that it not be cashed. The Corporation did not have enough money or other liquid assets to cover the check or make it good. The money held by the Title Company

was obtained from Mrs. Lawson's personal checking account upon the second presentation of her check for payment by the Title Company (Agreed Statement on Appeal, App. 2, 3, 5).

The plaintiff sued as a principal on the contract. It did not sue as an assignee or third party beneficiary. If it had not put up the deposit, it was not entitled to demand it back. If it had not executed the contract it could not sue for damages for its breach. There were substantial factual issues as to plaintiff's standing to sue as real party in interest. In view of these issues, summary judgment was properly denied.

2. <u>The Appellee Sellers Were Ready, Willing and Able to Make Settlement but the Appellant Purchaser Was Not.</u>

The contract in question provided for a down payment in cash of $60,000.00, assumption of a final trust of $75,000.00 and second trust of $45,000.00 and giving back a third trust for the balance of the purchase money of $50,000.00. The third trust was payable half in one year, half in two years, with interest payable monthly commencing ninety days after settlement. Unbeknown to all parties, a payment had recently been made on the first trust which reduced its balance to $67,500.00.

Two proposals were advanced at settlement to adjust this variation. The second trust holder offered to add $7,500.00 to his trust balance, but in return wanted faster payment and personal guarantees. This was rejected and has not been pressed by either appellant or appellee as proper solution.

The other proposal advanced was to add the $7,500.00 to the third trust, making it payable at the end of the term, i.e. two years after

settlement. As far as the third trust was concerned, plaintiff's representative testified that the corporation had already discussed its plans with FHA and "anticipated that we would be able to be under construction with an FHA loan before any payments were due on the third trust and that is what we hoped to accomplish, so we would not have too much cash out in the land before we began construction." (App. 31). In other words, the balances made no difference, only the carrying charges. When, on cross examination, appellee's counsel pointed out that the additional interest under the proposed arrangement would be only $675.00 at the most, Mrs. Lawson quickly changed her tune and started talking about additional security. (App. 52-56). Counsel later agreed, as Judge Keech reported "that the increase in periodic payments would be minimal, and therefore would not constitute a material departure.

The only other alleged departure from the terms of the contract is the seller's purported insistence upon additional security for the third trust. The defendants offered no proof on the alleged demand. The evidence before the trial judge was the undisputed testimony of Mrs. Lawson that the only property of the Corporation available for use as additional security was the income from a note from Mandell Ourisman to be given as part of a settlement in July, 1964 (the following month) (App. 46, 47, 48, 57, 58) that the Corporation was prepared to make use of that note to some extent as security under the third trust (App. 59) but not to the extent of the full $50,000.00 value of the third trust (App. 57, 59), that the sellers asked her to assign the proceeds of the note to them as security for that trust (App. 56), but that "we never had a conversation about how much security they wanted for their third trust. But there was conversation on we will not be difficult about that, we will be able to settle that,"

(App. 58). When asked how much of the note proceeds she was prepared to set aside, she said "We were going to have discussions" (App. 57).... "We had not discussed it. I was prepared to be reasonable." (App. 59).

Mrs. Lawson does not deny the contract to "set aside additional assets." The only asset of the Corporation was the Ourisman note. The sellers asked her to assign the proceeds of that note as security, but there was no discussion of the amount to be assigned. Even though no figure was mentioned, she was unwilling to assign the proceeds of that note as security for the trust (App. 56, 57). She apparently made no alternate proposals.

Mrs. Lawson obviously came to the settlement meeting on June 29, 1964 to talk and not to settle. The corporation she represented had made a contract to "set aside sufficient assets to satisfy 3rd thust holders." The only substantial asset of the Corporation was a promissory note, which it was not willing to "set aside." Is it any wonder the third trust holders were not satisfied?

Although there is no evidence of a demand in any amount, defendants admitted arguendo that they could not demand more than $50,000.00 be set aside. Certainly there can be no actionable variation if no demand is made for one.

The Trial Court, moreover, decided that as a matter of law the defendant's had a right to be satisfied up to the full amount of the third trust contracted for, absent any showing of fraud or bad faith. There is no doubt that this is the law of the District of Columbia:

> *"There is no law to prevent persons from making contracts wherein the purchaser stipulates that the thing purchased shall work to his satisfaction. Courts should not hesitate to enforce such conditions....*

> *"Plaintiff here assumed the obligation of furnishing a machine that would be satisfactory to the defendant. The sole question of determining the fitness of the thing to perform its work was left to the judgment of the defendant. All that was required of defendant was that the machine be given a trial, which was done. We are not concerned with the wisdon or folly of the plaintiff in making such a contract."*

Rondinella v. Southern Railway Company, 33 App. D.C. 65.

See also Baver Steam Soot Blower Co. v. W. G. Cornell Co., 47 App. 146.

These two cases happen to concern the satisfaction of a purchaser with the operation of mechanical equipment. It is clear, however, that a contract to perform to the satisfaction of another is valid and enforceable in the District of Columbia, and absent fraud on bad faith, the Courts will not inquire into the wisdom of such an arrangement. The Rondinella case also seems to indicate that the Courts should not inquire into the reasonableness of the dissatisfaction. The general rule on this point is express in 17 Am. Jur. 2d Contracts #367:

> *There is considerable diversity of opinion as to whether dissatisfaction must be based on reasonable grounds under a contract calling for performance to the satisfaction of a party. Of course, under the view followed in a few jurisdictions that a party paying has an unqualified option to reject the subject matter of such a contract, the reasonableness of his determination cannot be inquired into. But apart from those jurisdictions, there are, in the main, two general rules regarding the test of the promisor's satisfaction: (1) the rule that the test of his satisfaction is his own personal judgment, to which most of the courts add the qualification that his personal judgment must be exercised in good faith, and (2) the "reasonable man" rule, that the promisor is legally bound to be satisfied with the articles or services furnished by the other party if a reasonable man would have been satisfied with them. In other cases, in recognition of the fact that the way in which a contract is to operate depends upon the intention, actual or apparent, of the parties to the contract, the view has been taken that whether a provision for performance to the promisor's satisfaction requires his personal satisfaction or merely the satisfaction of a reasonable man depends upon the intention of the parties in the individual case as determined by a proper construction of the contract in which all the circumstances are considered.*

> *In addition to, or in conjunction with, the above rules and principles, a distinction has been drawn between cases involving subjective and objective standards of satisfaction--that is, between cases where the taste, fancy, or sensibility of the promisor is involved and those where only operative fitness or quality, or mechanical utility, is involved. In the latter class of cases the subject matter of the contract is such that the satisfaction stipulated for must be held to apply to quality, workmanship, salability, and other like considerations, rather than to strictly personal satisfaction. But where the subject of the contract is one which involves personal taste or feeling, an agreement that it shall be satisfactory to the promisor necessarily makes him the sole judge of whether it answers that condition. He cannot be required to accept the performance by the other party simply because other or reasonable people might be satisfied with it, for that is not what he contracted for. In this class of cases the right of decision is reserved to the promisor and not to a jury. This is held to be so even though the courts with regard to other kinds of contracts calling for the satisfaction of the promisor may follow the "reasonable man" rule.*

Other federal jurisdictions which have considered the question of reasonableness of dissatisfaction include the Fifth Circuit:

> *"One who contracts that he shall be satisfied touching a matter of opinion or judgment is entitled to satisfaction."*
>
> Lanier v. New York Life Ins. Co., 88 F. 2d 196 the Fourth Circuit.
>
> *"Where a person contracts to do work to the satisfaction of another, such other is the sole judge of the quality of the work done, and his right to accept or reject it is absolute, conclusive and binding upon the parties, without investigation of his reasons, unless he acts fraudulently."*
>
> Tow v. Miners Memorial Hospital Association, 305 F. 2d 73.

Our sister jurisdiction of Maryland, whence we derive our common law beginnings, holds generally that the promisor's own determination as to whether the performance is satisfactory is final and conclusive, however unreasonable, Baltimore & Ohio R. Co. v. Brydon, 65 Md. 198, 3 A 306, 9 A 126, but this personal judgment must be exercised in good faith. Devoine Co. v. International Co., 151 Md. 690, 136 A 37.

In Simpson v. Prudential Insurance Co. of America (1962) 227 Md. 393, 177 A 2d 417, the Maryland Court of Appeals was asked to construe a clause providing for insurance coverage "if the company...shall determine to its satisfaction that the proposed insured was insurable." The Court said, inter alia:

> *"We think that the clause means that the applicant must meet an objective standard of insurability, and that this standard is the company's own standard for the plan, the amount and the benefits applied for, at the rate applied for. Honest satisfaction is the standard usually applied under contracts calling for the satisfaction of a party, in the absence of some clear indication to the contrary. See 5 Williston, Contracts (3rd Ed), #675 A, 675 B; 3 A Corbin, Contracts #644, 645; Restatement, Contracts, #265."* 177 A 2d at 425.

Thus it would appear that when an objective standard is available it should be applied. When no standard is available, personal judgment exercised in good faith is final and conclusive.

In this case there is no objective standard or mechanical test which can be applied. There is no suggestion of bad faith. The personal judgement of the sellers (defendants) as to their own satisfaction should therefore be final and conclusive.

It is difficult if not impossible to apply a test of reasonableness in this case, were such a test appropriate. There is no evidence of the amount requested by defendants to be set aside. On the contrary, Mrs. Lawson testified twice that the amount was never discussed (App. 58, 59). The parties discussed the form that the security might take (assignment of note proceeds, frozen bank account, loans to the sellers on other properties) but the plaintiff never came up with a concrete proposal. It was the plaintiff's duty to "set aside sufficient assets to satisfy 3rd trust holders." Mrs. Lawson came not to settle, but to renegotiate the contract.

She never made a proposal of the nature and amount of assets the Corporation proposed to set aside. She never even made a tender of performance which the sellers could reject. She just came to talk.

Even had the sellers demanded the setting aside of $50,000.00 or its equivalent, this would have been a reasonable demand. As pointed out by the trial judge, a third trust on speculative property is "mighty risky business." The sellers were only contract owners, and the purchasers knew it. The sellers needed the cash down payment to complete their contract with Mr. Wilson, and the purchaser knew it. The sellers' entire profit was wrapped up in that third trust, and the purchaser knew it. The sellers were dealing with a corporation whose only substantial asset was a promissory note, and were not demanding personal endorsements from the corporate officers or stockholders. The sellers were waiting two years to receive their profit. They were even willing to wait seven months after settlement for the money to be set aside (App. 47, 48) even though the contract contemplated setting the assets aside at time of settlement and contains no provision for partial performance at a later date. Even then the sellers only asked to set aside the January payment of $35,000.00 (App. 47, 32).

The parties were all educated, experienced, professional people who knew what they were signing. There could be no overreaching. Mrs. Lawson knew what she was supposed to do at settlement. She was just unwilling to do it.

3. <u>The Trail Court Properly Excluded Evidence of the Price Paid By the District of Columbia in Condemnation Proceedings Seven Months Later</u>.

During the course of the trial the appellant proffered evidence that that property in question was sold to the District of Columbia Government on

January 12, 1965 for $240,000.00 and that defendant Bogan, Inc. received at least a partial commission on the resale. (App. 14) The evidence was excluded by the trial court upon timely objection of appellee. (App. 21, 22)

Appellant now urges that the proffered evidence was admissable on two grounds:

(1) The evidence was relevant on the question of damages.

(2) The subsequent resale bars enforcement of the forfeiture.

Both of these positions are entirely without merit.

1. The measure of vendee's damages for the breach of a contract for the sale of real estate is the difference between the purchase price and the market value at the time of executing the contract.

Harten v. Loffler, 212 U.S. 397, 29 S.Ct. 351, 53 L. Ed 568 affirming 29 App. D.C. 490.

Quick v. Painter, 88 U.S. App. D.C. 47, 186 F. 2d 355.

Speculative value is not market value, Urciolo v. Sachs, 62 A 2d 308.

The vendee is not entitled to loss of prospective profits, but merely to the difference between the contract price and the fair market value at the time the conveyance should have been consummated.

Cohen v. Lovitz, 255 F. Supp. 302, affirmed Wolf v. Cohen, 379 F. 2d 477, 126 U.S. App. D.C. 423.

In determining fair market value, some weight may be given to contemporaneous bona-fide sales.

Urciolo v. Sachs, supra, Rogers v. Lion Transfer and Storage Co., 120 U.S. App. D.C. 186, 345 F. 2d 80.

Forced sales of real property are not generally admissable as evidence of value. 29 Am. Jr. 2d Evidence #395.

> *"Evidence of the price paid for real property or the price at which it was sold, is admissable where the sale or purchase is so recent that the conditions affecting the value are substantially unchanged; but where the sale or purchase was made at a remote time, or conditions affecting the value have since materially changed, evidence of the sale or purchase price is inadmissable....as to the remoteness of the time of purchase or sale of property, much is left to the discretion of the trial court. 29 Am. Jur. 2d Evidence #396.*

The measure of compensation that must be paid in an eminent domain suit is the fair market value of the property being condemned at a time just prior to the taking.

Reservation Eleven Associates v. D.C. No. 22142, this Court, decided July 2, 1969, citing U.S. v. Miller, 317 U.S. 369; H & R Corp. v. D.C., 122 U.S. App. D.C. 43, 351 F. 2d 740.

A condemnation award should take into consideration the highest and most profitable use of the property. Reservation Eleven Associates v. D.C. D. C., supra.

The announcement or even internal consideration of general government planning, long before any condemnation activities, may have an effect on value of lands involved, sometimes a beneficial, sometimes an adverse effect. Reservation Eleven Associates v. D.C., supra, citing Danforth v. U.S., 308 U.S. 271.

The trial judge was an experienced jurist and, in addition, was particularly qualified to judge the evidentiary value of condemnation awards because of his service as Corporation Counsel for the District of Columbia. It should also be noted that the proposed evidence concerned a negotiated settlement and not a jury award. No evidence was proffered by plaintiff

that market conditions in January 1965 were the same as in June, 1964. As a matter of fact, no expert testimony of value was proffered at any time. The only testimony in the record was Mrs. Lawson's statements that she and her associates intended to use the land for an FHA housing project, that she had had preliminary discussions regarding financing with FHA which she described as "informal discussions" but no committments (App. 53, 31). As to the contract price, she testified (Transcript of Marjorie Lawson's testimony of February 10, 1969, P. 36-37):

> *"A. ...(T)he price of the property in an FHA deal is of little consequence. It is the FHA appraisal of the property that sets its value.*
>
> *Q. So you knew you had not overpaid for the property?*
>
> *A. I knew FHA was agreeable to that price.*
>
> *The Court: By that price, you mean your contract price?*
>
> *The Witness: Yes, sir."*

What Mrs. Lawson was saying was that the fair market value of property such as that involved here is the value that FHA puts on it for purposes of financing the proposed project. She had talked to FHA and knew informally what their evaluation was. She was satisfied that this was the fair market price, and it was.

The plaintiff did not produce the FHA appraiser, the District Government appraiser, or any independent appraiser to describe the market, the condition of the property or any other relevant factors in either June, 1964 or January, 1965.

In this condition of the evidence it was quite proper for the trial judge to exercise his discretion in favor of exclusion of the proffered

evidence as (1) too remote in time, (2) under threat of condemnation and not in the free market, (3) unsupported by evidence of market conditions and land conditions to evidence comparability, and (4) contradictory of plaintiff's previous evidence.

2. The appellant claims that because the property was resold at a profit after the forfeiture was declared, the appellees cannot now enforce the forfeiture. The identical claim involving identical contract language was considered and rejected by the Municipal Court of Appeals in Schwartz v. Rettger, 83 A 2d 279, citing Sheffield v. Paul T. Stone, Inc., 68 App. D.C. 378, 98 F. 2d 250 and Barnette v. Savers, 53 App. D.C. 169, 289 F.567.

These cases establish that the "forfeiture" provided in these contracts is not used in the technical sense, but means that in the event of a breach the vendor may keep the deposit as liquidated damages. The vendor has his choice of liquidated or common law damages. By exercising his election to take liquidated damages he waives whatever claim he might have against the defaulting vendee for loss on resale. The contract is terminated and damages are finally determined between the parties. The subsequent resale is an entirely independent transaction having no effect on the terminated relationship.

The Campanella case cited by appellant is not apposite. It involves attempts to forfeit after resale. The Court said, in effect, that the vendor had elected to take his chances on common-law damages instead of declaring the forfeiture. He can't have it both ways.

In this case the appellees declared the forefeiture in a timely and conspicuous manner, long before the subsequent resale.

The contention that because the deposit was held by the Title Company in escrow, so that appellees could not forfeit because they did not have actual possession, is so frivolous as to not require rebuttal.

The judgment of the District Court upon stipulation by all parties that the facts were not disputed and the case should be determined as a matter of law, should be affirmed without alteration, as being in exact conformity with the law of the District of Columbia.

Respectfully submitted,

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DI. 7-3040

Certificate of Service

I certify that two copies of the foregoing Brief of Appellee was mailed postage prepaid to John Vanderstar, Attorney for Appellant, 888 - 16th St., N.W., Washington, D.C., and Kurt Berlin, Attorney for Appellees Richards and Kittrie, 320 Southern Building, Washington, D.C., this 22 day of July, 1969.

Matthew A. Kane

REPLY BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23049

HENSON CREEK DEVELOPMENT CORPORATION, INC., a corporation, Appellant

v.

WILLIAM E. RICHARDS, NICHOLAS N. KITTRIE, and BEAU BOGAN, INC., a corporation, Appellees

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Appeal From the Judgment of the United States District Court for the District of Columbia

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FILED SEP 15 1969

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23049

HENSON CREEK DEVELOPMENT CORPORATION, INC., a corporation, Appellant

v.

WILLIAM E. RICHARDS, NICHOLAS N. KITTRIE, and BEAU BOGAN, INC., a corporation, Appellees

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Appeal From the Judgment of the United States District Court for the District of Columbia

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REPLY BRIEF

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1. There were no "genuine issues of material fact" in connection with Henson Creek's motion for summary judgment.

Bogan's brief */ claims that Henson Creek's "standing to sue" was in issue. It was not. The sellers did take the position that Henson Creek did not reimburse Mrs. Lawson for the amount of the deposit she had put up. But her affidavit,

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*/ The sellers, appellees Richards and Kittrie, have filed no brief.

filed with the motion, unequivocally stated that the corporation had reimbursed her. Under Fed. R. Civ. P. 56(e), the matter of reimbursement could be made a genuine issue only "by affidavits or as otherwise provided in this rule," setting forth "specific facts," not by "mere allegations or denials." See also Local Rule 9(h). The sellers offered nothing, not a single shred of evidence, to rebut Mrs. Lawson's affidavit.*/ (See appellant's brief, p. 13 n.*.) Thus, there was no "genuine issue" on this score.

Bogan also seems to claim that the sellers raised a "genuine issue" when they asserted that "they had no contract with Henson Creek." Bogan has this point backwards. The sellers did so assert, and it is precisely that assertion that Henson Creek relied upon in moving for the return of the deposit. If there was no contract, there was no justification for failure to return the deposit.

Henson Creek's motion for summary judgment should have been granted.

2. The legal arguments Bogan makes with respect to the second argument contained in Henson Creek's opening brief

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*/ The sellers instead demanded that they be allowed to explore the question through discovery. But no reasons were given to support this demand, as required by Fed. R. Civ. P. 56(f). In any case, even by the time of trial the sellers had no evidence to rebut Mrs. Lawson, and her testimony (App. 43) on the point stands uncontradicted.

have already been answered in that brief. Here it is necessary only to correct some misstatements Bogan makes.

First, Bogan implies that Henson Creek, in claiming that the sellers' counter-offers were material departures from the contract, did not rely upon the demand for additional security until cross-examination of Mrs. Lawson by Bogan's counsel showed that the other variations were minor. Bogan Brief, p. 4, citing App. 52-56. Yet the last page Bogan cites, App. 56, contains this testimony by Mrs. Lawson:

> A You may remember that I have testified that was not the major consideration. The major thing was how we would agree on setting aside sufficient assets to satisfy third trust holders, and the third trust holders were making it pretty clear they wanted money set aside, or failing that, would we make them some loans. [Emphasis added.]

See also Mrs. Lawson's testimony on direct, App. 35-36, and on cross by the sellers' counsel (which preceded the cross by Bogan's counsel), App. 46. The question of additional security was in the case from the outset, and to say that "Mrs. Lawson quickly changed her tune" (Bogan Br., p. 4) is wholly improper.

Second, Bogan's brief correctly states that the only testimony on the demand for additional security was Mrs. Lawson's. However, the quotations in the brief, pp. 4-5, are from Mrs. Lawson's testimony about events prior to settlement.

Her testimony about the settlement conference was that the sellers demanded additional security for the $7,500 by which the sellers proposed increasing the third trust. (See, e.g., App. 46, where during cross-examination by the sellers' counsel, Mrs. Lawson testified that "We now had to secure an additional $7,500." See generally the record citations in Henson Creek's brief, p. 7).

Third, Bogan also continues to deny that the sellers originally demanded that Henson Creek set aside the full $50,000 face amount of the original third trust. Curiously, however, Mrs. Lawson was asked a number of times on cross-examination whether she had been willing to set aside that amount. See App. 47, 57, 58, 59. Moreover, both of the sellers and Bogan's president testified at trial, and none of them contradicted Mrs. Lawson's testimony that the demand was indeed made.

Finally, Bogan's brief asserts (p. 9) that Henson Creek knew the sellers, who were only contract owners, "needed the cash down payment to complete their contract with Mr. Wilson" (the prior owner of the property) and that their "entire profit was wrapped up in that third trust." There are no record citations, and in truth the record is squarely to the contrary. Mrs. Lawson testified that she did not know how much the sellers were going to pay Mr. Wilson for the

property, App. 49-50, and without knowing that fact it would be impossible to know about either the down payment or the profit. Also, Mrs. Lawson testified without contradiction that the sellers agreed that the cash due them by Henson Creek need not be put up at settlement but could be paid later, App. 33-34, 45.

3. The third section of Bogan's brief raises nothing that has not already been dealt with in Henson Creek's opening brief.

Respectfully submitted,

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September 15, 1969

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HENSON CREEK DEVELOPMENT CORPORATION, INC.

Appellant

vs

WILLIAM E. RICHARDS, et al

Appellees

No. 23049

PETITION FOR REHEARING

Come now the Appellees, William E. Richards and Nicholas N. Kittrie, by and through their attorney, and petition the Court for a rehearing of the above-titled case.

Issues Presented for Rehearing

1. Whether the Court of Appeals improperly reversed or disregarded the District Court's finding of fact that "plaintiff was not willing to go forward at settlement date, and further, was not ready and able to do so in conformity with the terms of the contract" (Appendix, p. 69, n.2).

2. Whether the Court of Appeals not only improperly reversed the finding of the District Court that the placing of $7,500.00 in the third trust constituted "no material change" (Appendix, p. 69) in the terms of the contract, but also introduced standards for rescission contrary to those required by Grymes v. Sanders, 93 U. S. 55.

3. Whether the decision of the Court of Appeals that the present case "presents the most favorable case for rescission" (Opinion and Judgment, p. 3) was supported by the evidence and record in the Court below.

1.

In its judgment the Court of Appeals totally and improperly ignored the District Court's finding that plaintiff was neither willing nor ready and able to perform under the contract.

The District Court in its Memorandum and Order made two main findings of fact upon which its conclusions of law were based. One of these findings was that "plaintiff was not willing to go forward at settlement date, and further, was not ready and able to do so in conformity with the terms of the contract." The other finding was that placing the $7,500.00 in the third trust was not a material change. The District Court's judgment ordering the forfeiture of plaintiff's deposit to defendants was based on both these findings of fact. In its reversal the Court of Appeals totally failed to address itself to the first finding regarding plaintiff's lack of readiness and ability to settle. This finding alone is sufficient to support the judgment of the District Court. Since the Court of Appeals did not, and indeed could not, contravene this finding of fact, the judgment of the Court of Appeals is in direct conflict with uncontested findings of fact and against the preponderance of the evidence.

The contract in issue in the instant case was signed on June 19, 1964. It shows for plaintiff the signature of Thomas M. O'Malley, secretary-treasurer of plaintiff. Marjorie Lawson later admitted that she had signed the contract using O'Malley's name (Appendix, p. 26). Yet the secretary-treasurer testified that he had not authorized her to do so. (Deposition of Thomas M. O'Malley, p. 14.) The contract called for settlement on June 29, 1964. Plaintiff conceded in this Court (Brief for Appellant, p. 6) that only on June 29, the day scheduled for settlement, was the fact of the earlier payment of $7,500.00 due on the first trust, first discovered by the settlement clerk and reported to plaintiff.

Plaintiff has sought to create the impression that their failure to perform under the contract was due to the resultant change in terms. Upholding plaintiff and reversing the Court below the Court of Appeals improperly failed to consider and weigh the evidence before the District Court about plaintiff's total unwillingness and unreadiness to perform under the contract. Plaintiff failed to appear at the settlement by authorized officer of agent. The only representation made for him at the settlement was by Marjorie M. Lawson, then a judge of the juvenile court, who was neither director, nor officer, nor attorney for plaintiff. At the time of settlement plaintiff was required to produce a total amount of $60,000.00 in cash, of which the original deposit of $10,000.00 was to be part. Yet the corporation on that day had in its bank account only a total of some $7,943.00. (Agreed Statement on Appeal, App.p5.) Moreover, the board of directors of plaintiff failed at all its meetings, including the last meeting of the board of directors of plaintiff immediately preceding the settlement date, being June 16, 1964, to adopt any resolution regarding the purchase of the property in question or the impending settlement or the funds required for it. (Agreed Statement on Appeal, App., p. 5) In fact, the treasurer of plaintiff admitted no recollection of any request to him for the cash required for the settlement. (Id., p. 23.)

There was no evidence whatsoever to indicate preparations made by plaintiff, even before the $7,500.00 discrepency was discovered, to meet its obligations under the contract. Plaintiff's brief before this Court admits that Mrs. Lawson did not bring the required cash to the settlement. (Brief for Appellant, p. 7, note.) Plaintiff assets, instead, that it was expecting substantial sums from the sale of a tract of land and that it had advised defendants that the cash due at settlement would be deferred until such sums were received. If indeed plaintiff was unable to perform under the contract on June 29, being the designated settlement date, an

extension of the original contract would have been required. Such extension cannot be unilateral. And defendants had not given their consent to such extension; indeed they were in no position to grant an extension since their own settlement on that very property was scheduled for the same day and the cash proceeds from plaintiff were to be used in defendant's settlement.

It is obvious, moreover, that had such extension been secured before settlement date, settlement would have been postponed altogether, since there certainly would have been no rationale for going ahead with plans for a settlement at which the payment due from plaintiff could not take place and consequently the transfer of title could not be effectuated.

There is no evidence in the Record of this case to contradict the District Court's finding that "The plaintiff was not willing to go forward at the settlement date, and further, was not ready and able to do so in conformity with the terms of the contract." (Memorandum and Order, Appendix, p. 69, n. 2.) The judgment of the District Court relies on this finding of fact as well as upon the finding that no material change was required in the terms of the contract. The Court of Appeals in its decision erroneously ignored and in fact reversed this evidence and finding.

This the Court of Appeals could not do since "Appellate jurisdiction is confined solely to questions of law, and where the evidence which militates against an appellent, considered by itself and without regard to conflicts in the entire evidence, is sufficient to support the findings, the questions ceases to be a question of law and becomes a question of fact on which the determination of the trial court is conclusive." 5 C.J.S., Appeal and Error, § 1454, p. 579. Malcart v. San Janquin Building and Loan Association, 114 P.2d 395.

2.

In its judgment the Court of Appeals, (a) improperly advanced sua sponte the mutual mistake of fact principle and improperly disregarded plaintiff's lack of diligence; (b) moreover, it improperly assessed the modifications required in the contract and erroneously concluded that material changes were necessary and that the contract should be rescinded.

(a)

Neither plaintiff nor defendants argued, in the District Court or before this Court, for the rescission of this contract on the grounds of mutual mistake of fact. The Court of Appeals interposed this legal principle in its judgment sua sponte. Absent a clear showing of gross injustice resulting from the failure of the parties or the Court below to raise this legal doctrine, the Court of Appeals exceeded its appellate function. "The reviewing Court will not go beyond the record and consider questions, or affirm on ground and theories, which are without the pleadings, evidence, findings, or issues which were tried and submitted to the jury or passed on by the Court." 5 C.J.S. Appeal and Error, § 1464(1), p. 664. Taylor v. Talbert, 25 P.2d 888, 134 C.A. 595.

The failure of the parties to argue mistake of fact is not accidental. First, it is the practice, in real estate transactions, for a seller to continue making payments on outstanding mortgages during the period from the contract date to settlement. It similarly usual for an appropriate adjustment to be made at settlement whereby the reduction in the amount of the original trust is added to the amount that the purchaser is obligated to pay the seller. Since interim payments on the trust are commonplace. and do not vary the amount of the purchase price, the fact that a payment is due and paid could not be properly claimed to be a surprise or change

Second, the contract gave constructive notice of the need for such payment. In the instant case the terms of the sales contract itself specifically referred to these payments which were due twice a year. Plaintiff, a corporation set up to

leal in real property, with both a president and secretary-treasurer who are members of the bar, and with representatives learned in law and experience in real estate (District Court Memorandum and Order, Appendix. p. 69, n. 3), should have found that contract's notice sufficient to inquire further regarding the payment dates.

The Supreme Court of the United States has clearly stated the principle that "Mistake, to be available in equity, must not have arisen from negligence. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person." Grymes v. Saunders, 93 U.S. 55, 61 (1876). Since plaintiff failed to make any inquiry regarding the payment dates under the first trust, it could not subsequently assert that it was adversely affected by the lack of such knowledge.

(b)

A major question both before the District Court and the Court of Appeals was whether the fact of the unknown payment was sufficient to produce such material change in the terms of the contract as to warrant its rescission. Since the amount due on the first trust was reduced by this payment from $75,000.00 to $67,500.00, the difference had to be added either to the cash payment made by plaintiff at the settlement or to the second or third trusts to be given by plaintiff to the defendants under the contract. Defendants did not seek an adjustment in the cash payment. Instead, they offered plaintiff the alternative of adding this amount to the third trust.

Did the fact of the payment and the resultant need for an adjustment have an adverse affect upon the interests of plaintiff? Plaintiff knew from the contract that semi-annual payments of $7,500.00 each were due on the first trust. He entered his purchase contract on June 19, 1964. Settlement was provided for June 29, 1964. There is no testimony in the record of this case as to plaintiff's expectation or assumptions regarding the next due payment under the first trust. (There is no

evidence that he relied in any way upon inaccurate information derived from defendants or their agents.) Excectedly, such payment could have become due any time between the contract and the settlement dates. Payment could have been required the day after settlement or shortly thereafter.

Instead of the possibility of having to come up with a semi-annual payment soon after settlement, on a first trust of $75,000.00, plaintiff learned on June 29 that on June 8 a payment of $7,500.00 was already made, reducing the amount to $67,500.00, and that his first semi-annual payment was consequently not due until December 8, 1964. As an adjustment for this payment, defendants suggested that an amount of $7,500.00 be added to the $50,000.00 third mortgage due to them of which $25,000.00 would have been due in one year and the remaining $32,500.00 in two years from settlement date.

In its opinion and judgment the Court of Appeals rejected on three grounds the District Court's finding of fact that the $7,500.00 payment produced no material change in the contract.

1. Interest—The Court of Appeals noted that adding $7,500.00 to the third trust would result in approximately $675.00 additional interest, being due on the third trust. What this Court failed to note was that since the first trust was reduced to $67,500.00 as of June 8, 1964, the interest payable by plaintiff on it, until its final maturity on June 8, 1968, would be equally reduced. Since both the first and third trust were bearing interest of 6 percent, transferring a given amount from the first to the third trust would have produced no interest change. It was therefore totally erroneous for the appeals court to point to increased interest as a material change in the contract.

2. Security—The District Court held that defendants upon agreeing to transfer the paid-up $7,500.00 from the first to the third trust, could not require from plaintiff additional security to that which was originally specified for the third

trust. (Memorandum and Order, Appendix, p. 69.) The opinion of the Court of Appeals likewise recites the defendants statement that no demand was ever made by them for additional security and their admission that as a matter of law they could not have demanded any security above the original $50,000.00. (Opinion and Judgment pp. 3-4.)

D Despite this recognition the appeals Court nevertheless pointed to the possibility that defendants, due to the third trust's growth from $50,000.00 to $57,000.00, might become more stringent in their demand for their entitled security. The possibility of such stringency the appeals Court considered as justifying a decision that a material change in the contract had occurred. Such conclusion, adjudicating the rights of parties not on the basis of actual conduct at the time of settlement but on the basis of what their conduct might have been, is totally unfounded in fact or in law.

The contract testifies to the fact that the third trust in the instant case was preceded by a substantial first and second trust. The sellers sought a security to supplant plaintiff's corporate signature, and plaintiff agreed in the contract to the giving of such security. Defendants would have been entitled to insist upon their full legal rights and their precautions were fully justified in light of plaintiff's subsecuent dissolution.

The evidence clearly shows that plaintiff came to the settlement unprepared to give any security for the third trust. Plaintiff at that time was selling some corporate property to Ourisman Chevrolet and it was the assignment of the notes received from that sale that plaintiff and defendants were discussing as a means for securing the third trust in the instant case. In this connection Judge Lawson testified in the District Court and Appellants Brief in this Court also quotes the testimony:

> "Q Did they ask you to assign the proceeds of that note to them as security for that trust?

"A Yes.

"C Were you willing to do so?

"A No, it would not.

"Q You would have assigned $50,000, but you would not have assigned $57,000?

"A I would not have assigned $50,000." (App. 56-57)

In its judgment the Court of Appeals penalizes defendants for a possible insistance upon their rights while ignoring plaintiff's total unwillingness to live up to its contractual obligation. The decision of the Court of Appeals in no way suggests that in their quest for security defendants were seeking to depart from the terms of the contract. Instead, the Court reaches the incomprehensive conclusion that through possibly strict insistence on rights already secured the defendants by the contract's security provision, the defendants might have produced a material change in the contract terms.

3. Timing of Payments—The Court of Appeals finds a major change in the contract terms due to the fact that the $7,500.00 would have been deducted from the first trust which was payable in five years and added to the third which was payable in two years. (Opinion and Judgment, p. 4.) The appeals Court stressed that the buyer would thus have had three years less to pay the $7,500.00.

The proposed transfer, however, would have only slightly altered the schedul of payments for plaintiff. Instead of a first trust of $75,000.00 payable through semi-annual installments of $7,500.00 and due in full by June 8, 1968, and a third trust of $50,000.00 payable in two equal payments of $25,000.00 each on June 29, 1965, and June 29, 1966, plaintiff was to assume a first trust smaller by $7,500.00 and a third larger by $7,500.00. Accordingly, on June 29, 1966, his final payment on the third trust was to increase by $7,500.00, but on June 8, 1968, his final first trust payment was to be $7,500.00 lesser. The reduction in the payment time was then less than two years.

Plaintiff conceded at the trial that the change in the periodic payments would be minimal (District Court, Memorandum and Order, Appendix, p. 67.) The District Court also found so. Had plaintiff considered such payment schedule change material he was at liberty to come up with a counter-proposal for the handling of the $7,500.00 adjustment. It would have been perfectly possible to arrange the plaintiff's payment of this amount to coincide with the original schedule of the first trust: This could have been done by adding the $7,500.00 amount to the third trust and providing that after a $25,000.00 payment on June 29, 1965, and a $25,000.00 payment on June 29, 1966, the final $7,500.00 was not to be paid until June 8, 1968, being the due date of the first trust. Had plaintiff made such offer and defendants refused it, they would have risked a claim of a material change on the part of plaintiff.

But plaintiff came to settlement with no intent to settle. As the District Court found: "The plaintiff, making no counter-suggestion, refused to settle, claiming a material departure from the terms of the contract. (District Court, Memorandum and Order, Appendix, p. 67).

This Court noted in its opinion, that plaintiff had not claimed that the change in the timing of payment would be material. "Neither the parties nor the trial court refers to the fact that the $7,500.00 would have to be paid at a different time as a result of the change." (Opinion and Judgment, p. 4.) There is nothing to suggest plaintiff's concern with such change. Since it was negotiating for an FHA construction loan (Appendix, p. 32), plaintiff would have had any way to pay off all outstanding trusts upon settlement with FHA, which plaintiff expected within eight to eighteen months (Appendix, pp. 54-55). Yet primarily on the basis of this single, relatively minor and unobjected to departure, the Court of Appeals concluded that there was a material change in the contract, justifying rescission.

In reaching this decision the Court of Appeals was engaging in findings of fact which should have been left to the trial court. Existence of a mistake is a

question of fact. Scheidt v. Schermerhorn, 105 A. 581, 133 Md. 468. The weight of evidence is a question of fact. 5 C.J.S. Appeal and Error § 1454, p. 579. What constitutes significant and trivial imperfection in the performance of a contract is a question of fact. Hammon Lumber Co. v. Yaeger, 197 P. 11, 185 C. 355; Conrad v. Foerst, 201 P. 795, 54 C.A. 277. Whether the unobjected to change in the schedule of payments constituted a material change was a question of fact erroneously dealt with by the Court of Appeals.

Moreover, the Court of Appeals determination of material change failed to comply with the principles previously enunciated by the Supreme Court of the United States. "A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The Court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved." Grymes v. Sanders, 93 U. S. 55, 60 (1876).

3.

The appeals Court finding of fact that the status quo was easily restorable in the instant case was not supported by the evidence in the record, was a usupation of the trial function and was erroneous.

The Supreme Court of the United States has postulated that: "A Court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it." Grymes v. Sanders, 93 U. S. 55, 62 (1876).

The Court of Appeals, in assessing the changes in position which occurred pursuant to the instant contract and the possibility of restoring the status quo, held in its Opinion and Judgment: "It seems to us that the present case presents the most favorable case for rescission." (p. 3). This again was a finding of fact not based on record evidence and properly belonging to the trial court. Indeed, since

defendants had elected not to seek actual damages but sought instead to recover the liquidated damages provided for—the trial record was devoid of relevant evidence regarding defendants change in position and expenses in returning to the status quo.

Defendants sought to show in District Court that plaintiff's failure to proceed with the settlement was not motivated by material changes in the contract. It was grounded, instead, upon two other factors. First, plaintiff lacked their immediate financing at the time. Second, plaintiff was hopeful that should the settlement not materialize defendants would be compelled to sell the property to plaintiff at a lower price. Indeed, after refusing to settle, Judge Lawson called defendant Richards, asking him to come to her chambers and offered defendants a new deal. (Testimony of Marjorie M. Lawson, Appendix, p. 40.)

The District Court noted these possible considerations for plaintiff's failure to go forward with the settlement. (Memorandum and Order, Appendix, p. 68, n. 1). The Court held, however, that these motivations were not material in light of plaintiff's failure otherwise to perform under the contract. But in light of the appeal Court's reversal of the decision below, the question of the status quo's restoration as well as the damages resulting to defendants from the failure of plaintiff to settle cannot be readily dismissed through an appellate conclusion.

Defendants were selling a contract right. Relying upon their sales contract with plaintiff, defendants themselves were seeking to settle on this property the very same day they were to sell it to plaintiff. Consequently, defendants terminated their own banking arrangements for the funds necessary for the settlement. Moreover, defendants discontinued the pursuit of both short and long-term financing for the development of the property. Neglected also were defendants own architectural plans for the construction of a high-rise building upon the property.

When plaintiff failed to settle, defendants incurred great expenses in order to save the property. Last minute expensive loans had to be secured in order to permit defendants to go to settlement. The lapse of time, not only the period from

June 19, the contract date, to June 29, settlement day—but also the period of preliminary negotiations with this plaintiff—resulted in financial losses which could not be recaptured through the later sale of the property.

This clearly was not a favorable case for rescission. The Appeals Court erroneously concluded that no one had relied upon this agreement to his detriment. The fact that only ten days passed between the signing of the agreement and the settlement date made this period even more critical for defendants.

Plaintiff has arbitrarily and fraudulently failed to perform under his contract. Had the District Court considered relevant the evidence of the cost of restoring the status quo ante for defendants, the record would have shown the losses to exceed the amount of the deposit in issue in the instant case. The deposit was specified in the contract as liquidated damages. It was erroneous for the appeals court to conclude that through a return of the deposit to plaintiff the status quo can be easily restored.

Conclusion

For the foregoing reasons appellees pray this Court to uphold the judgment of the Court below ordering the forfeiture of the deposit to appellees.

Erroneously exceeding its appellate function, improperly reversing the lower Court on questions of fact and making its own findings of fact outside of the record evidence, the judgment of the Court of Appeals is also defective, finally, for its clear conflict with the authority of the United States Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Petition for Rehearing was mailed, postage prepaid, to John Vanderstar, Attorney for Appellant, 888 - 16th Street, N. W., Washington, D. C., and Matthew A. Kane, Attorney for Appellee Beau Bogan, Inc., 1331 G Street, N. W., Washington, D. C., this 24th day of April, 1970.

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